



Environmental Use Controls
K.S.A. (2004 Supp.) 65-1,221 through 65-1,235

ENVIRONMENTAL USE CONTROLS

65-1,221. Intent. The intent of this act is to provide a voluntary mechanism to assist existing state programs to address environmental contamination in a cost effective manner that is protective of human health and the environment.

History: L. 2003, ch. 130, 1; July 1.

65-1,222. Definitions. As used in this act:

(a) "Department" means the Kansas department of health and environment.

(b) "Environmental use control" means an institutional or administrative control, a restriction, prohibition or control of one or more uses of, or activities on, a specific property, as requested by the property owner at the time of issuance, to ensure future protection of public health and the environment when environmental contamination which exceeds department standards for unrestricted use remains on the property following the appropriate assessment and/or remedial activities as directed by the department pursuant to the secretary's authority. For the purposes of this act, "environmental contamination" does not mean animal or process waste from a confined feeding facility as defined in K.S.A. 65-171d, and amendments thereto, livestock operations or the application of livestock waste for use as a plant nutrient. Any environmental use control created pursuant to this act runs with the property and is binding on the owner and subsequent owners, lessees and other users of the land.

(c) "Owner" means any owner of record of property, and any person or entity with written authorization from the owner to make decisions regarding the transfer of the subject property or placement of encumbrances on the subject property, other than by the exercise of eminent domain.

(d) "Person" means any individual, trust, firm, joint stock company, public or private corporation, limited liability company or partnership; the federal government or any agency or instrumentality thereof; any state, or any agency, instrumentality or political or taxing subdivision thereof; or any interstate body.

(e) "Protective structure" means an engineered physical structure implemented as part of the remedial action to control or respond to a release or threat of release of environmental contamination. Protective structure includes capping, fencing, berming, diking, drainage structures and other structures that may control migration or other releases of environmental contamination.

(f) "Property" means real property.

(g) "Remedial activity" means any site cleanup, soil or groundwater monitoring associated with a contaminated property, remedial action, corrective action, emergency

action, removal action or other action necessary or appropriate to respond to a release or threat of release of environmental contamination.

(h) "Secretary" means the secretary of health and environment.

History: L. 2003, ch. 130, 2; July 1.

65-1,223. Exclusions from act. (a) The provisions of this act, except the provisions of subsection (b) of K.S.A. 2004 Supp. 65-2,230, and amendments thereto, shall not apply to solid waste disposal areas which are issued permits pursuant to K.S.A. 65-3407, and amendments thereto, or which receive authorization from the secretary for unpermitted disposal pursuant to K.S.A. 65-3407c, and amendments thereto, provided that the owner of each such solid waste disposal area establishes environmental use controls for the area, subject to approval by the department, by executing and filing a restrictive covenant on the property deed.

(b) The provisions of this act shall not apply to confined feeding facilities as defined in K.S.A. 65-171d, and amendments thereto.

History: L. 2003, ch. 130, 3; July 1.

65-1,224. Environmental use control; application; requirements; approval or disapproval. (a) An owner of property, with departmental approval, may restrict the use of the owner's property to mitigate the risk posed to human health and the environment by imposing on the property an appropriate environmental use control.

(b) (1) If the owner elects to voluntarily restrict use of or activities on the owner's property, the owner or the owner's authorized representative shall make application to the department for approval of an environmental use control. Such application shall be made on forms provided by the department and shall be completed and submitted to the department by the owner or the owner's authorized representative.

(2) Department approval of an application shall be subject to the application's containing the following components: Appropriate restrictions to protect public health and the environment from known contamination which exceeds department standards for unrestricted residential use; access to the subject property; an inspection schedule that is appropriate to monitor conditions at the subject property; and the availability of funds to administer the provisions of this act related to the subject property.

(3) The department may require the applicant to provide financial assurance for category 3 property as described in subsection (c)(3) of K.S.A. 2004 Supp. 65-1,226, and amendments thereto, based on the potential for long term maintenance cost of protective structures and the potential for release or migration of environmental contamination from the property. The applicant shall provide the financial assurance by one or more methods satisfactory to the department, including, but not limited to, environmental



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insurance, guarantee, performance or other surety bond, letter of credit, qualification as a self-insurer or other demonstration of financial capability. The demonstration of financial capability must be adequate to provide remedies which are protective of human health and the environment should the proposed remedial activity fail.

(4) The application shall include an accurate legal description or survey of the portion of the property where an environmental use control is proposed.

(c) The department shall review the application. If the application is disapproved by the department, the applicant may modify the application in a manner necessary to obtain department approval and resubmit the application for the department's approval. If the application is approved by the department, the department shall provide the applicant a written approval.

(d) An environmental use control pursuant to this act may be approved by the department as part of the remedial activity for the property when residual contamination which exceeds department standards for unrestricted residential use on the subject property.

History: L. 2003, ch. 130, 4; July 1.

65-1,225. Same; recording with register of deeds; enforcement. (a) After an environmental use control has been approved by the department, the owner must register the environmental use control with the register of deeds in the county where the property is located or, if property is owned by the United States or a division thereof, a notice of the environmental use control must be filed with the register of deeds in the county where the property is located. When registering the environmental use control or filing the notice, the following must be included:

(1) A notarized original environmental use control agreement between the applicant and the department; and

(2) An adequate legal description or legal survey of the property which identifies the portion of the property which is subject to the environmental use control.

(b) The applicant must provide to the department a notarized copy of the recorded environmental use control agreement with the register of deeds seal for the property.

(c) Recorded environmental use controls established pursuant to this act shall be enforceable as set forth in K.S.A. 2004 Supp. 65-1,229, and amendments thereto.

History: L. 2003, ch. 130, 5; July 1.

65-1,226. Same; funding requirements; categories of property. (a) Funding needs may be satisfied by department appropriations for property where adequate funding is supplied by federal grants, designated fee funds or other funding sources.

(b) Any funding requirements for an application pursuant to this act, will be based on a one time payment for the property, made by the original applicant.

(c) Funding requirements for other properties will be determined individually and be based on the size of the

property to which the environmental use control applies, toxicity and mobility of the contaminants to which the environmental use control applies, frequency of site inspections and the anticipated inspection costs, as determined by the department.

(1) Category 1 property includes property with the following characteristics: The property is not greater than five acres in size, the residual contamination is characterized by low toxicity and mobility, there is minimal anticipated maintenance of protective structures and the anticipated inspection frequency is once every five years. Category 1 properties would have a one-time payment by the applicant not to exceed \$2,000 to fund the life of the environmental use control.

(2) Category 2 property includes property with the following characteristics: The property may cover areas larger than five acres in size, the residual contamination is characterized by moderate toxicity and mobility, there is limited anticipated maintenance of protective structures and more complicated and/or costly inspections are anticipated, with an inspection frequency of not more than once per year. Category 2 property would have a one-time payment by the applicant not to exceed \$10,000 to fund the life of the environmental use control.

(3) Category 3 property includes property with some or all of the following characteristics: The property may cover a large acreage, the residual contamination is characterized by higher toxicity or mobility, complicated maintenance or monitoring of protective structures is required and frequent or complicated site inspections are anticipated, which may be more frequent than once per year. The inspection cost of category 3 properties is also dependent on the future uses of the property and the maintenance of protective structures by the property owner. For this reason, long term care agreements between the department and the applicant will be required for category 3 properties. These long term care agreements will include a provision to reimburse the department for costs incurred to perform the long term care at the property.

(d) The secretary shall remit to the state treasurer, in accordance with K.S.A. 75-4215, and amendments thereto, all moneys received from fees and long term care reimbursement agreements pursuant to this section. Upon receipt of the remittance, the state treasurer shall deposit the entire amount in the state treasury and credit it to the environmental use control fund.

History: L. 2003, ch. 130, 6; July 1.

65-1,227. Same; term; removal or expiration; modification; liability. (a) An environmental use control may be granted either in perpetuity or for a term of years, as determined by the department. An environmental use control may not be approved for a term of years unless provisions are included that ensures the protection of human health and the environment beyond the expiration of the environmental use control. Upon expiration of the term



if contamination remains above department standards, as set forth in the approved environmental use control, the department can require additional action.

(b) An environmental use control runs with the land and is binding on all successors in interest to property until the environmental use control is removed upon the department's approval or upon expiration of the term of the environmental use control.

(c) An environmental use control shall be removed if the property owner demonstrates to the department's satisfaction that the original risk to human health or the environment which created the need for the control is no longer present. An owner must submit a request to the department for approval to remove all or a portion of the environmental use controls from the property. The department shall review the request and provide the owner with the department's decision to approve or deny the request within 120 days after the department's receipt of the request. If the department denies the request, justification shall be provided to the owner with a written explanation of the denial, which may include that the applicant has not provided the documentation to demonstrate that the request is protective of human health and the environment, as determined by the department.

(d) If the department approves an owner's request to remove all or a portion of environmental use controls, the owner shall file the approval with the register of deeds in the county where the property is located.

(e) An environmental use control may not be extinguished, limited or impaired through adverse possession, abandonment, waiver, lack of enforcement or other common law principles relating to covenants or by the exercise of eminent domain.

(f) An environmental use control may be modified by mutual written agreement by the property owner and the department.

(g) The department shall not acquire any liability by virtue of approving an environmental use control or by approving removal of all or a portion of environmental use controls.

History: L. 2003, ch. 130, 7; July 1.

65-1,228. Same; restrictions or prohibitions. (a) An environmental use control pursuant to this act may restrict or prohibit the activities at or uses of property. The restrictions imposed shall be those agreed to by the applicant and deemed necessary by the department to protect the public from exposures to contaminants which remain at the property.

(b) An environmental use control pursuant to this act may include or require the following:

(1) Prompt notification to the department of any transfer of the property, such notice to be given by the transferor;

(2) prompt notification to the department of any change in use of the property, such notice to be given by the property owner;

(3) maintenance of protective structures or remedial

systems at the property, such as soil caps, soil covers, soil surfaces, berms, drainage structures, vegetation, monitoring wells or other structures or systems;

(4) access to the property by agents of the department as necessary to inspect and monitor remediation activities, monitoring wells, surface streams and protective structures or remedial systems and to ensure implementation and enforcement of the requirements, restrictions and other limitations of the environmental use controls;

(5) any other obligations necessary to reduce or eliminate risks or threats to human health and the environment from the property; or

(6) a one-time payment or long term care agreement to provide funding for environmental use control oversight.

(c) Restrictions, prohibitions and zoning requirements placed on property by a local or state government may be substituted in place of an environmental use control. Such restrictions, prohibitions and zoning requirements may be utilized in addition with any environmental use controls approved by the department. This provision does not grant or expand authority of local government to restrict, prohibit, zone or regulate land.

(d) All interests not limited by the environmental use control shall remain with the owner.

History: L. 2003, ch. 130, 8; July 1.

65-1,229. Same; enforcement. (a) Upon receipt of information that approved environmental use controls are not being implemented in accordance with an approved environmental use control agreement or that property subject to an approved environmental control presents a hazard to human health or the environment, the secretary may take such actions as may be necessary to protect human health or the environment. The action the secretary may take shall include, but not be limited to:

(1) Issuing an order directing the owner of the subject property to take such steps as are necessary to correct any deficiencies and fully implement the approved environmental use controls.

(2) Issuing an order retracting the approval of the remedial action for the subject property, which included the environmental use control as part of the remedy and require the owner of the property to implement remediation of the property to a cleanup standard which will allow for unrestricted use of the property.

(3) For category 3 property as described in subsection (c)(3) of K.S.A. 2004 Supp. 65-1,226, and amendments thereto, commencing an action enjoining acts or practices set forth in the approved environmental use controls or requesting that the attorney general or appropriate district or county attorney commence an action to enjoin such actions which result in approved environmental use controls not being implemented or not being fully or properly implemented or which present substantial and imminent threat or hazard to human health or the environment.

(b) Any order of the secretary pursuant to subsection



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(a)(1) or (a)(2) is subject to hearing and review in accordance with K.S.A. 2004 Supp. 65-1,234, and amendments thereto.

(c) An environmental use control may not be separated from the property and survives foreclosure of a mortgage, lien or other encumbrance, as well as tax sales and the issuance of a tax deed.

History: L. 2003, ch. 130, 9; July 1.

65-1,230. Same; department oversight and tracking. (a) The department shall provide oversight of the environmental use control for property to ensure that the property is being used only for the purposes permitted by the terms of the environmental use control agreement and is not being used in a manner that is prohibited or restricted by the terms of the agreement.

(b) The department shall develop and maintain an environmental use control tracking system on all approved environmental use controls. The tracking system data shall be made available to the public in a manner which allows review by either city or county and shall include the following:

- (1) Name of the property;
- (2) address of the property, including the city and county;
- (3) legal description of the property;
- (4) cause and type of the environmental contamination;
- (5) description of the environmental use control; and
- (6) duration of the environmental use control.

History: L. 2003, ch. 130, 10; July 1.

65-1,231 Environmental use control fund. (a) There is established in the state treasury the environmental use control fund. Moneys from the following sources shall be deposited in the state treasury and credited to the fund:

(1) Moneys collected from the environmental use control one-time payments and long term care agreement reimbursements;

(2) moneys received by the secretary in the form of gifts, grants, reimbursements or appropriations from any source intended to be used for purposes of the fund; and

(3) interest attributable to the investment of moneys in the fund.

(b) Moneys in the environmental use control fund shall be expended only for costs of:

- (1) Review of environmental use control applications;
- (2) oversight of remedial projects which include an environmental use control as an element of their remedy, including inspections, monitoring and tracking of the environmental use control;
- (3) activities performed by the department to address immediate or emergency threats to human health or the

environment related to properties subject to environmental use controls;

(4) development, operation and maintenance of the environmental use control tracking system; and

(5) administration and enforcement of the provisions of this act.

(c) On or before the 10th of each month, the director of accounts and reports shall transfer from the state general fund to the environmental use control fund interest earnings based on:

(1) The average daily balance of moneys in the environmental use control fund for the preceding month; and

(2) the net earnings rate of the pooled money investment portfolio for the preceding month.

(d) All expenditures from the environmental use control fund shall be made in accordance with appropriation acts upon warrants of the director of accounts and reports issued pursuant to vouchers approved by the secretary or the secretary's designee for purposes set forth in this section.

History: L. 2003, ch. 130, 11; July 1.

65-1,232. Rules and regulations. The secretary shall adopt rules and regulations to implement the provisions of this act.

History: L. 2003, ch. 130, 12; July 1.

65-1,233. Publication of approved use controls. The department shall publish annually in the Kansas register a summary of the number of approved environmental use control agreements pursuant to this act.

History: L. 2003, ch. 130, 13; July 1.

65-1,234. Review of agency actions. A person adversely affected by any order or decision of the secretary pursuant to this act, within 15 days after service of the order or decision, may request in writing a hearing. Hearings under this section shall be conducted in accordance with the provisions of the Kansas administrative procedure act. Any action of the secretary pursuant to this section is subject to review in accordance with the act for judicial review and civil enforcement of agency actions.

History: L. 2003, ch. 130, 14; July 1.

65-1,235. Severability. If any provision of this act or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this act which can be given effect without the invalid provision or application. To this end the provisions of this act are severable.

History: L. 2003, ch. 130, 15; July 1.